

# Costs of arbitral proceedings (A General Survey and a Report on the Practice of PAC-CCC)

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Conference paper

*This report deals with certain practical issues connected with arbitration costs. The outlined problems are, among others, the definition of different types of costs, the relationship of parties, arbitrators and arbitral institutions, and the effects of depositing advances for costs in the course of arbitral proceedings. Various methods of determining arbitrators' fees and administrative charges are considered, and a comparative analysis of the cost schedules of some world arbitral institutions is given. The text provides information on relevant rules and practices of the Permanent Arbitration Court at the Croatian Chamber of Commerce.*

## A. Introduction

1. The two questions usually asked by the parties when considering arbitration or initiation of arbitral proceedings are: 1) how long will the proceedings last, and 2) how much they will cost<sup>1</sup> The choice of alternative methods of dispute settlement (including arbitration) is most commonly motivated by the search for the cheapest and most reliable way of providing legal protection. However, we must admit that it is very difficult to give an accurate answer to any of these questions, just as it is difficult to solve the main problem of every arbitration case - i.e. which party is going to win.

2. It is very difficult today to defend a universal assertion that arbitration is cheap; it is just as difficult to defend another universal assertion that it is more expensive than proceedings before ordinary courts would be. This is true for both the domestic and international arbitration. It is also difficult to make comparisons between the costs of these two types of arbitration or between the cost of an institutional and a non-administered (*ad hoc*) arbitration. Among the advantages of an *ad hoc* arbitration, some authors mention the fact that an institutional arbitration is "virtually more expensive" because of *ad valorem* schedules of arbitration costs and additional administrative costs<sup>2</sup> Other eminent experts in the field of international arbitration, cite some *ad hoc* proceedings or domestic arbitration cases as practical examples of the "most expensive" arbitration.<sup>3</sup>

3. In the situation when we have to admit that arbitration costs can never be accurately predicted or determined, the worst solution would be not to talk about them at all. Later in this paper some basic hints about the ways of determining and charging the costs of arbitral proceedings in general will be presented. The second part of this paper gives an overview of the practice of the only Croatian institution involved with international arbitration - the Permanent Arbitration Court at the Croatian Chamber of Commerce (hereinafter referred to as: PAC-CCC).

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<sup>1</sup> See Eric A. Schwarz, in: Introductory note, *The ICC International Court of Arbitration Bulletin*, 4:1/1993 (further cited as: ICC-Bulletin), p.1.

<sup>2</sup> Comp. Kreindler, "Arbitration and settlement of disputes, including ADR", the materials from: *Seminar on the Drafting of International Commercial Contracts*, London, December 14-16, 1992, p.7.

<sup>3</sup> Comp. Craig-Park-Paulsson, *ICC Arbitration*, Paris 1985, p.30, where there is an example of an *ad hoc* arbitration the costs of which amounted to almost US \$ 1 million, and a domestic English arbitration where the costs after half the proceeding were already higher than 1 million pounds sterling.

## I. Basic principles

### B. What are the arbitration costs?

4. The arbitration costs include a number of only loosely connected types of different costs incurred by conducting an arbitration procedure. There are costs that are typical and common to any judicial proceeding, e.g. costs of legal counsels, costs of the hearings and presentation of evidence, expert fees and expenses, costs of recording and interpreting and other costs commonly connected with the process of adjudication, as well as costs that are unique to an arbitral settlement of commercial disputes. The latter, (herein defined as arbitration costs in a narrower sense), consist of the fees and expenses of the arbitral tribunal (of an individual arbitrator or of a senate of arbitrators) and, in the case of the so called institutional or administered arbitration (an arbitration assisted by a permanent arbitration institution - such as arbitration court or arbitration center), of the so called administrative costs. We shall deal in detail with the arbitration costs in the narrower sense. We will also consider other procedural costs to the extent that in arbitration, they tend to differ from costs that emerge in the process before the courts of law.

5. As opposed to proceedings conducted before the ordinary courts of law, in which court fees are regulated by law and collected by an authorized governmental agency or body, in procedures held before arbitration bodies, there is full autonomy. The issue of arbitration costs is essentially entirely independent of the legal relationships which are the subject-matter of the dispute. Regarding arbitration costs in the narrower sense, it is the question of a separate legal relationship established between the parties and arbitrators (possibly also between them and an arbitration institution), as opposed to the conflicting relationship (dispute) that exists between the parties themselves. Arbitration law of most national legislations does not mention arbitration costs at all. The UNCITRAL Model-law also does not contain such provisions. We can therefore say that the separate legal relationship between the parties and arbitrators appointed to solve their dispute is regulated by general rules of contract law..

6. The independence of the obligation to pay the arbitration costs and the dispute being decided upon in the arbitration proceedings has its practical consequences. Because of the separation of the relationship from the dispute between the parties in arbitral proceedings, the fact that arbitration costs (in the narrower sense) are paid or not paid, does not in any way influence the validity of the arbitral award.<sup>4</sup> The arbitral tribunal cannot competently decide on it, not only because that legal relationship is not covered by the arbitration clause (relating to the mutual relation of the parties, and not to the relation between the parties and the arbitral tribunal) but because arbitrators would thus become judges in their own cause and would significantly jeopardize the idea of their impartiality. All arbitral institutions, and it is the same with the arbitrators in *ad hoc* arbitral tribunals, therefore have the practice of requiring down payments or deposits out of which they have to cover their fees and the possible administration costs. Such down payments or deposits are usually made at the beginning of the proceedings, and at the latest, before the making of the final award.

### C. Methods of determining the arbitration costs

7. As opposed to *ad hoc* arbitral proceedings which leave the fixing of the arbitrators' fees' to the free negotiation of the parties, most permanent arbitration institutions have some more or less objective criteria for their determination.<sup>5</sup> With regard to the collection of fees and costs of the hearing, arbitral

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<sup>4</sup> This does not relate to the decision about who will bear the arbitration costs, which is part of the award and which could theoretically be the reason of its setting aside. However, that decision is also separable from the decision on the merits, so that its possible setting aside should not effect the rest of the award.

<sup>5</sup> There are, however, some important exceptions: for instance, according to the Rules of International Arbitration of the American Arbitration Association (AAA), the amount of the arbitrator's fee may be freely negotiated on the basis of the schedule

institutions have a very specific intermediary position between the parties and arbitrators.<sup>6</sup> Thus, the freedom to negotiate the compensation that the arbitrators get for their work, is not endangered. An arbitration institution sets by its rules and schedules of fees the general conditions for determining the arbitrators' fees, setting the deposits, and methods and time-limits of payment to the members of the arbitral tribunal. This intermediary role between the parties and arbitrators often represents a significant part of the work performed by arbitral institutions, and avoids the need of arbitrators in institutional arbitration to directly address the questions of compensation for their efforts.<sup>7</sup>

**8.** There are two different systems of determining the arbitration costs (fees and administrative costs) being used with some variations by most important arbitration institutions. One of them, which is predominant in Continental Europe, is the system *ad valorem litis*, according to which the costs are determined on the basis of the amount in dispute. The other one, used primarily in the Anglo-Saxon countries, is the *ad diem* system: the values of the arbitrators' fees and the administrative costs are determined in the proportion to the time that the arbitrators and the arbitral institution have spent settling the case.

**9.** Generally speaking, both these systems have their advantages and disadvantages, and the representatives of arbitral institutions often argue about them. It has to be admitted, however, that the predictability is greater with the *ad valorem litis* system, but still not always complete. Even when it is possible to relatively precisely determine the amount of the arbitration costs with regard to the merit of the case, the fees of the arbitral tribunal often leave enough room to step out of the given framework in exceptional situations. These departures are very rare in practice, although due to some specific circumstances they may be unavoidable, since in the case of the contrary, either the arbitrators or the parties could be seriously aggrieved.

## **II. Costs of arbitral proceedings in international cases before the Permanent Arbitration Court at the Croatian Chamber of Commerce**

### **D. General principles and differences between proceedings with or without an international element**

**10.** Having acquired jurisdiction for the settlement of international disputes, the Permanent Arbitration Court at the Croatian Chamber of Commerce (PAC-CCC), among other things, ought to enact adequate rules on costs of proceedings. In its arbitration rules, the PAC has consistently accepted the principle of a double track regime, i.e. separate rules for disputes with and without an international element (domestic and international cases). The rules determining the costs in domestic disputes had been passed even before the PAC started dealing with international disputes. They have shown very good results in practice, and, subject to some minor amendments, they have been by and large maintained. For international disputes, separate rules on costs have been enacted.<sup>8</sup> Thus, unlike the Permanent Arbitration Court at the Chamber of Commerce of Slovenia, PAC has two different, significantly diverse sets of rules on arbitration costs, one applicable to international and one to domestic disputes.

**11.** The PAC has chosen the system of determining arbitration costs according to the amount in dispute, - i.e. the *ad valorem litis* system. The first consideration was the interest of the parties in predictability of

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or daily wages at the beginning of each arbitral proceeding, depending on its complexity and its merit, between the parties and the AAA. If it is not possible to reach an agreement, the appropriate amounts shall be determined by the arbitral institution (AAA) and submitted in writing to the parties. Comp. article 33, *International Arbitration Rules*, in the version of May 1, 1992.

<sup>6</sup> Comp. Melis, Function and Responsibility of Arbitral Institutions, in: *Comparative Law Yearbook Of International Business*, p.112.

<sup>7</sup> Craig-Park-Paulsson thus state that "it is improper for ICC Arbitrators, in a draft award of otherwise, to purport to determine the amounts that will be paid to them"; comp. cit. p. 125.

<sup>8</sup> The Schedule Of Fees In The International Proceedings before the PAC-CCC, *Official Gazette*, 57/92 (hereinafter: Schedule of Fees).

the costs incurred by engaging the PAC and arbitral tribunals operating under its umbrella. A relatively rigid system has thus been established, so that the administrative costs and the costs for the arbitrators' fees for every case value can be precisely determined. The principle of predictability is strongly respected in practice and there are hardly any departures from the amounts stated in the schedule of fees, although some rules may allow such a possibility.

**12.** In every proceeding before the PAC, as is the case with other arbitration institutions and most *ad hoc* arbitral tribunals, the parties are expected to make a deposit toward the arbitration costs. In international disputes, the arbitration costs are covered by both parties, whereas in the domestic ones, it is only the claimant who makes the deposit. We shall concentrate on the proceedings with an international element and more thoroughly examine some particular elements of the arbitration costs and techniques of their determination and coverage.

### **E. Registration fee**

**13.** An arbitral proceeding before the PAC is initiated by submitting the statement of claim to the Secretariat of the Court. In order for the arbitration court to consider it in the first place, it is necessary, with the statement of claim and the counter-claim, to also submit evidence of payment of the registration fee. The registration fee for proceedings before the PAC is rather low in comparison with other arbitral institutions. In a two-party procedure it amounts to DM 500, being increased for each subsequent party by 10 per cent. The registration fee is non-refundable. It is not paid back to the claimant regardless of the continuation of the proceedings, and represents a minimal expense of engaging the PAC in any proceeding with an international element.

**14.** The registration fee covers the administrative costs of the PAC in the first stage of the proceedings, from the submittance of the statement of claim to the expiry of the period of time fixed for the submission of the statement of defense. During that stage it is first of all necessary to determine, among other procedural elements, the number of arbitrators, without which it is impossible to determine the amount of the deposit to cover other arbitral costs. According to the Zagreb rules, the parties may agree upon - if they have not done so in the arbitration clause - the number of arbitrators. However, if they do not reach an agreement within 15 days after the statement of claim had been submitted to the defendant, it shall be presumed that there will be an arbitral tribunal consisting of three arbitrators.

### **F. Deposit for arbitration costs**

**15.** Having provided evidence of payment of the registration fee, the conditions are fulfilled for the first action of the PAC: the statement of claim being submitted to the defendant. The arbitral tribunal may submit a request for an additional deposit to the parties as soon as the number of arbitrators in an arbitral proceeding is determined. This request is usually sent to the parties upon the expiry of the time period for the statement of defense to be communicated. The president of the PAC then determines the total amount of the predictable procedural costs which, in addition to the arbitrators' fees and administrative costs, include some other foreseeable costs (travel expenses incurred by the arbitrators, costs of the hearing held outside the place of arbitration, costs for interpreting and probative proceedings, and similar costs). Compared to some other international arbitration institutions which generally require considerable deposits on material costs, the PAC has a fairly restrictive practice of depositing these costs, and the parties are at that stage usually asked to only deposit an advance for the arbitrators' fees and the administrative costs, while other costs are balanced later or when they actually incur.

**16.** The arbitrator's fee is determined according to the Schedule of Fees. The listed amounts are applied for an individual arbitrator, and when a senate of three arbitrators has been appointed, the amounts are increased two and a half times (in exceptional cases up to three times). Additional 10 per cent of that amount has to be paid for each additional co-party (e.g. if there are two co-claimants, and three co-

respondents, the total amount of the fees will increase by 30 per cent). To the total amount of arbitrators' fees, the administrative costs are added (10 per cent of the fees of an arbitral senate, or 20 per cent of the fee of a sole arbitrator), and, if appropriate, the amount of foreseeable material costs. The final amount, usually covering the total cost of the arbitral proceeding, is then divided between the parties to the dispute and each of them is required to pay its share of the deposit.<sup>9</sup>

**17.** The PAC Secretariat has to send a request to the parties to pay the deposit, asking them to pay it in equal portions within 30 days after the receipt of the request. The underlying assumption of this system of depositing an advance, which is dominant in international practice, is that both parties are cooperative and interested in a quick settlement of the case. They also have an equal interest in services rendered by the arbitral tribunal, and it would therefore be unjust for only one party to deposit an advance of arbitral costs which are sometimes considerably high. This is however not always the case in practice. Often the respondent refuses to deposit an advance or defaults on the request of the arbitral tribunal. The system of determining and collecting the costs contains, however, some mechanisms to fight such an uncooperative conduct of the respondent.

**18.** If the claimant fails to deposit his share of the advance within 30 days, there will usually be another notice for him to do so with a shorter term (as a rule: 8 days after the receipt of the request). If the advance is not deposited by then, article 6 of the Schedule of Fees may be applied, according to which the President of the PAC, if "the advance is not deposited within the reasonable time", shall make the decision to delete the submitted statement of claim from the case register of the PAC. The practical consequences of such a decision are similar to those of the withdrawal of the statement of claim. In order to re-initiate the arbitral proceedings, the claimant has to re-submit his statement of claim, pay again the registration fee and take the negative consequences regarding the observance of contractual and statutory time limits. The PAC shall not communicate the file to the arbitral tribunal until the full amount of the advance has been deposited.

**19.** If the claimant deposits his share of the advance, and the respondent expressly declares that he refuses to deposit his share of the advance or defaults on the requests of the arbitral tribunal<sup>10</sup>, the claimant shall be requested to pay the missing part of the advance within 30 days.<sup>11</sup> Strictly based on the Zagreb Rules and the accompanying Schedule of Fees, this part of the deposit must also be actually paid to the account assigned by the PAC. The failure on the part of the claimant to do so would have the same consequences as the failure to pay the initially requested part of the deposit: the file would not be given to the arbitrators, and if the deposit were not paid within a reasonable time limit, the statement of claim would be deleted from the register. However, the Secretariat of the Arbitration Court usually takes a flexible stand in such cases, and in accordance with the practice of some other arbitral institutions, the claimant has been given the opportunity to submit a bank guarantee of a solid banking institution, instead of the actual payment of the missing part of the deposit. The PAC shall, depending on the circumstances, cash it during the proceedings, or at the latest, before the end of the main hearing. Naturally, if the claimant cannot provide the arbitral tribunal and its bodies with such a guarantee, he exposes himself to the danger of the application of the rule from article 6 of the Schedule of Fees.

**20.** It is possible that during arbitral proceedings the taking of evidence and other actions done by the parties may cause additional material costs not covered by the previously paid deposit. In such a case, the parties are requested to pay an additional advance, in the manner and in accordance with the already described mechanism of the cost depositing. The arbitral proceeding shall not be continued until the payment of the additional deposit has been made.<sup>12</sup> If the costs for the presentation of evidence have not

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<sup>9</sup> Comp. Article 5 and Article 9 of the Schedule of Fees.

<sup>10</sup> If it seems justifiable, the respondent is pursuant to article 26 of the *Zagreb Rules*, given a short additional time limit to do it, unless he expressly refused to pay the advance.

<sup>11</sup> Comp. Article 5, par. 3, Schedule of Fees.

<sup>12</sup> Comp. Article 5, par.7, Schedule of Fees.

been deposited, the arbitral tribunal may refrain from evidence-taking, and may decide by applying the burden of proof rules.<sup>13</sup>

### G. Value determination of the matter in dispute

**21.** In the *ad valorem litis* system of fixing and collecting arbitral costs, the determination of the value of the conflicting claims is decisive. The problem is simple only at first sight: it is true that in a number of arbitral proceedings a condemnatory award expressed in an easy-to-calculate money value is claimed; however that is not always the case. In international disputes, the claims are often expressed in different currencies. In order to fit them into the Schedule of Fees, the arbitral tribunal converts them into German Marks (furtheron: DM), by applying the middle exchange rate from the exchange rate list of the National Bank of Croatia, valid on the day on which the arbitral tribunal receives the information on the amount in dispute.<sup>14</sup> It primarily applies to convertible currencies; for other currencies, "an appropriate method shall be applied" (par.3 of the same rate number). Any method being applied in the world monetary market may be considered and the most important goal is to judge the value of the conflicting claims as realistically as possible.

**22.** It is necessary here to separately deal with the question of the interest rate and its influence on determining the amount in dispute. In spite of the fact that the domestic procedural legislation<sup>15</sup>, both in theory and practice, does not include the value of incidental demands in the amount in dispute in a civil procedure, the **Zagreb Rules** do not ancillary apply solutions of the domestic civil procedural law. This leaves open the possibility of applying other corresponding rules, such as the express provision in the arbitration fee schedule of the Chamber of Commerce of Zurich, according to which "the interest claims are not considered"; but "should they be higher than the principal sum, then they replace the latter in calculating the value in dispute."<sup>16</sup> It is the question of calculation that the PAC has considered with restraint so far. Its application is not out of question in cases in which the statement of claim is expressed in Croatian kunas or some other un-convertible currency. Although the inflation rate in Croatia is currently very low, there were times (especially in 1991-1992) when the interests rates were, due to hyper-inflation, extremely high and actually represented a revalorized amount, sometimes ten and ten of times higher than the original (nominal) sum in dispute.

**23.** Similar problems of determining the amount in dispute occur, if claims are not precisely defined, e.g. if claims are not quantified or if periodical payments are claimed - penalties or compensations in fixed amounts per month or year, or are not expressed in the money value (e.g. claims for termination of contract, or declaratory claims as to the existence of contract). Similar problems occur with any arbitral institution that applies the *ad valorem litis system*, and in practice, additional mechanisms for their solutions are developed.<sup>17</sup> In the **Zagreb Rules** and in the corresponding Act on Costs of the Proceedings, there are no special instructions for the operation of the Secretariat of the Arbitration Court in such a case. A conclusion may be drawn that all the legitimate methods of value determination are allowed. Generally speaking, one can proceed from an assumption that the claimant, who according to

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<sup>13</sup> Comp. Article 33, par.6 of the *Zagreb Rules* that authorizes the arbitral tribunal to decide on "the admissibility, relevance, materiality and weight of the evidence offered, and which party has to discharge the burden of proof".

<sup>14</sup> Comp. Schedule of Fees, article 9, rate # 2. The relation of currencies according to that list is basically in accordance with the one on the international level.

<sup>15</sup> Comp. article 35, par. 2 of the Croatian Code of Civil Procedure (CPP), in which it is stated that "interest claims, costs of proceedings, penalty charges and other incidental demands are not considered unless representing the principal demand".

<sup>16</sup> Schedule of Arbitration Costs of Zurich Chamber of Commerce, Art. 2.1. Comp. *ICC-Bulletin*, p. 13, note 25.

<sup>17</sup> In the Schedule of Conciliation and Arbitration Costs of the ICC Court (2.c&d) it is provided that in such cases the Court shall fix the administrative expenses and arbitrators' fees at its discretion. In practice, the Secretariat has consultations with the arbitrators and parties, trying to at least approximately determine the complexity and the importance of a case. If that is not possible, the ICC Court applies the practice of lump-sum determination of the primary deposit. This practice has been examined lately, in order to be substituted by a more flexible approach. Comp. *ibid*.

article 21, par.2 ad G) of these rules, is obliged to make notice of the amount in dispute, will do it properly according to the nature of the case. When in doubt, the Secretariat of the PAC may use all the available means to determine the amount that would approximately correspond to the real value of claims in dispute.<sup>18</sup>

**24.** Another question to be asked is the influence of the changes made to the amount in dispute in the course of arbitration proceedings. Possible exchange rate fluctuations are not of any importance here: it is only relevant when the receipt of the statement of claim (or of any subsequent submission that specifies the requirement) was registered with the Secretariat of the PAC. It is different with changes caused by the will of the parties - having increased or decreased the claim. When increasing the amount in dispute, pursuant to article 5 paragraph 5 of the Schedule of Fees, the arbitral tribunal may require the parties to pay an additional deposit, being calculated according to the new amount in dispute.<sup>19</sup> If an additional deposit is required, the increased statement of claim will only be taken into consideration upon the payment of the additional deposit. As to the decrease of the amount in dispute, it is relevant only if communicated to the PAC before transmission of the files to the arbitrators.<sup>20</sup>

**25.** The Schedule of Fees of the PAC also contains some provisions aimed at encouraging cooperation of both parties when depositing an advance for the costs. Thus in article 9, tariff no. 3 of the Schedule of Fees in the proceeding with an international element, it is stated that the value of the statement of claim and of the counter claim for purposes of calculation of the amount of arbitration costs shall be added up only if the parties pay the deposit for the arbitration costs in equal shares. Otherwise, the advance shall be calculated for the statement of claim and for the counter claim separately. It means in practice that the claimant, who refuses to pay the deposit, will in the course of arbitral proceedings be faced with the need to alone deposit the advance money for his possible counter claim. Because of the regressive nature of the Schedule of Fees of the PAC, it also represents a significant increase of the arbitration costs that in the end will be borne by the unsuccessful party.<sup>21</sup>

**26.** Determining the value of the matter in dispute for the purpose of a set-off is a separate problem. The theory of European continental procedural law is practically unanimous in saying that, for the sake of clarity, if the complaints are not part of the statement of claim or counter-claim, they should not be included in calculating the matter in dispute value. However, in the practice of some of the most important arbitral institutions, there are provisions according to which the compensation complaints are also added to the value, "if they require consideration of additional issues on the part of the arbitrator". Such practice has been accepted by the ICC and by the Arbitration Court in Zurich<sup>22</sup> In the international arbitral proceedings initiated before the PAC so far, the problem of compensation complaints has not been raised. But, if it becomes an issue, there is a presumption that the arbitral tribunal will take a restrictive attitude regarding the calculation of compensation complaints into the matter in dispute value. It is possible, however, that upon consultations with the arbitrators and parties in some disputes a contrary standpoint is taken, particularly if it is certain that the settlement of compensation complaints will require considerable time and effort on the part of the arbitrators, regardless of the main claim and its settlement.

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<sup>18</sup> The Croatian CCP (Art. 40, par. 3) also contains a provision which authorizes the judge to examine quickly and appropriately the accuracy of the value stated as "amount in dispute", either at the preparatory or at the main hearing, prior to commencing hearings on the merits, if it is obvious that claimant has set the value of dispute too high or too low.

<sup>19</sup> In practice, the parties are invited to pay an additional advance if the increased value in dispute is significant. If it only leads to a smaller increase of the arbitrators' fees and administrative costs, it is as a rule ignored.

<sup>20</sup> Schedule of Costs, article 5, par. 7.

<sup>21</sup> As an example, in an arbitral proceeding in which the statement of claim value amount to DEM 1,000,000.00 and of the counter claim to DEM 1,500,000.00, and if both parties deposit an advance for all the costs in equal shares, the costs of the arbitrators' fees and administrative costs amount to DEM 66,000.00; to the contrary, if a separate calculation is applied, these costs amount to DEM 103,000.00 (even 56 % more).

<sup>22</sup> Comp. article 16 of the Internal Rules of the International Arbitration Court of ICC; *Schedule of Arbitration Costs* of the Chamber of Commerce of Zurich, article 2.1; see also ICC-Bulletin, p.13; for criticism see Karrer, "Arbitration Saves! Costs: Poker and Hide-and-Seek", *Journal of International Arbitration*, 35:3/1986, p.41-42.

## H. Effects of Changes in the Composition of the Arbitral Tribunal and of Termination of Proceedings Prior to Making an Award

27. It sometimes happens during arbitral proceedings that because of the challenge of an arbitrator<sup>23</sup>, his withdrawal from office<sup>24</sup>, or his resignation or death<sup>25</sup>, there is a change in the composition of the arbitral tribunal. Such changes, as a rule, result in the repetition of the hearing and of other procedural activities<sup>26</sup>. Therefore, under such conditions, the same job very often has to be done twice. Although such situations may cause additional costs, in the *Zagreb Rules* and the accompanying Schedule of Fees there are no particular provisions about their impact on the arbitration costs. There is a tendency in practice to minimize the effects of such changes on the total costs of arbitral proceedings, and to ignore them completely with regard to the administrative costs and arbitrators' fees. In other words, consistent with the practice of other arbitral institutions<sup>27</sup>, it is held that the appointed arbitrators take on the risk of their possibly leaving the arbitral tribunal prior to the completion of the proceedings. If, however, the change in the composition of the arbitral tribunal is not caused by any of the parties, it is not considered legitimate for the parties to bear the costs for repeating procedure - even if it is necessary, because of the nature of the case. Arbitrators are, after all, paid only upon completion of the arbitral proceedings, when the president of the PAC brings the final ruling on the amount of the arbitrators' fees.<sup>28</sup> With that ruling, the president of the arbitral tribunal decides upon the distribution of the fee between the "original" arbitrator and his "substitute"; without prejudicing possible decisions. It has to be mentioned that in most cases, we can expect that the fee for the activities to be repeated will be assigned to the later arbitrator. It is possible, however, that the arbitrators are given an advance for their fees in the course of the proceedings.<sup>29</sup> But, in practice, an advance is very rarely paid for arbitral activities that have to be repeated because of the change in the composition of arbitral tribunal.<sup>30</sup> If that happens, it is possible that the substituted arbitrator may be asked to return the "overpaid" part of the deposit<sup>31</sup>. Such practice, among other things, also encourages efficiency and expeditiousness of arbitral tribunals that operate under PAC. Naturally, the rule of the subsequent payment is valid only for the advance of the fee; as for material expenditures, they are always paid to the arbitrators in advance.

28. While in the case of changes in the composition of the arbitral tribunal, the risk of one part of the job remaining unpaid is left with the arbitrators; the reverse is the situation when the proceeding is terminated without a final decision on the merits. In this case a large portion of the risk is taken by the parties. Namely, although the purpose of the arbitration is to authoritatively regulate a conflicting situation by an effective and final award, not all of arbitral proceedings end in such a way.<sup>32</sup> A significant number of disputes end with a settlement or withdrawal of the statement of claim, and in some cases the proceedings

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<sup>23</sup> Comp. article 15 of the *Zagreb Rules*.

<sup>24</sup> Comp. article 16, par.3 of the *Zagreb Rules*.

<sup>25</sup> Comp. article 18 of the *Zagreb Rules*.

<sup>26</sup> Comp. article 19 of the *Zagreb Rules*; in exceptional cases, with the agreement of the parties, the arbitral tribunal may decide not to repeat the hearing.

<sup>27</sup> Comp. *ICC-Bulletin*, p. 14.

<sup>28</sup> Comp. article 6, par. 1 of the Schedule of Costs.

<sup>29</sup> Comp. article 7, *ibid*. A relatively high upper limit of the deposit that can be paid (70 per cent of the total amount meant for the arbitrators) was originally meant as the ultimate measure of avoiding the inflationary depreciation of the arbitrators' fees; under current conditions of zero-inflation in Croatia, PAC tries to hold the advance of fees within much lower limits.

<sup>30</sup> It would thus be justifiable to award fees to the arbitrators, if partial award is made; however, if only the main hearing has taken place and no awards on the merits are made, the advance to arbitrators may be granted only exceptionally.

<sup>31</sup> The conclusion is drawn *per analogiam* from the provision of article 9, tar. no. 5, par. 2 of the PAC Schedule of Costs.

<sup>32</sup> Because of insufficient domestic practice - most of the international arbitral before the PAC have been initiated only in the last two or three years, and there have been no relevant statistical evaluation data so far - we could only refer to the statistics of ICC according to which approximately one third of all the initiated proceedings, with fairly regular distribution, are terminated by issuing a final award (37,6 % of all the initiated proceedings in the last ten years). Comp. *ICC-Bulletin*, p. 3.

cannot be brought to an end because of flaws in the arbitral agreement, because of bankruptcy or death of the parties, or similar procedural obstacles. Regardless of the way the proceeding is terminated, the fact remains that there has been an effort by the arbitral institution and arbitral tribunals to find the final solution of the dispute, and the activities undertaken have to be compensated. It is not possible to foresee the effort made in each particular case in advance: sometimes the proceeding is terminated immediately upon the initiation, sometimes at the point when it is already ripe for adjudication. The PAC rules therefore contain a flexible provision according to which, in the case in which an arbitral proceeding is not terminated by passing a final award, the president of the PAC determines an "appropriate" amount of arbitrators' fees and administrative costs and makes the decision regarding the return of the remaining portion of the deposit to the parties.<sup>33</sup>

## I Final bearing of arbitration costs

**29.** In comparative procedural law, there are three different systems of determining which party will, and to what extent, bear the costs of arbitral proceedings. According to one of them, regardless of the outcome of the dispute, each party bears its own costs. According to the second one, all the procedural costs are to be fully paid for the party that has succeeded in its claim. Finally, according to the third system, the parties are to be compensated for the costs in proportion to their success on the merits. The third approach, which basically corresponds to the solutions of the domestic procedural law,<sup>34</sup> and of the procedural law of some important European national systems (e.g. Austrian, German, and Swiss), as well as to the solutions of large European arbitral institutions, has also been accepted in the practice of the PAC. Thus article 3 of the Schedule of Fees in the procedure with an international element states that "in its final award the arbitral tribunal will determine what party is obliged to compensate the other party for the procedural costs and for what proportion, and also bear its own costs, taking into consideration the success in arbitral proceedings and other important circumstances."

**30.** The arbitral tribunal will thus allocate the procedural costs in proportion to the success in the dispute (e.g. 15%-85%, 40%-60% etc.) It has to be mentioned that the cost distribution in the final award is not a matter of pure mathematics: the arbitral tribunal also takes into consideration "other relevant circumstances", among which the most important one is the *culpa* principle - an assessment about what costs are justified and who has incurred them. There are also other circumstances that the arbitral tribunal may find relevant. The decision on the final allocation of the obligation to bear costs between the parties is, as a rule, part of the final award (if the proceedings are terminated in such manner). It can also be made in the form of an independent decision. In any case, the claim for reimbursement of costs is a particular, although subordinate demand,<sup>35</sup> which can only be decided by the arbitral tribunal (an individual arbitrator or a senate of arbitrators) and in no event by the arbitration institution.

**31.** Apart from arbitral costs in the narrower sense (the arbitrators' fees and administrative costs), and actual expenses, the procedural costs also include the costs of representation. Parties to a dispute with an international element before the PAC may freely appoint their counsel<sup>36</sup>. Such counsel does not necessarily have to be an attorney, particularly not a Croatian one. The parties may, if they find it necessary, engage a foreign attorney. Nothing prevents the arbitral tribunal from including the expenses and fees of such persons in the arbitral costs that the less successful party will have to pay to the more successful one. It depends entirely on the reasoning of the arbitral tribunal. Not even in the comparative arbitral practice are there any unified criteria according to which these costs could be decided. The decision completely depends on the characteristics of the particular case and on the principles accepted by

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<sup>33</sup> Schedule of Arbitration Costs, article 9, par. #5, par.1.

<sup>34</sup> Comp. e.g. article 154 of the Code of Civil Procedure (CCP).

<sup>35</sup> Like any other claim in arbitral proceedings, this one also has to be done expressly. The tribunal cannot decide on claims unless they have been expressly stated - *nemo iudex sine actore*.

<sup>36</sup> Comp. article 7 of the *Zagreb Rules*.

the particular arbitral tribunal.

## J. The claims for depositing security for costs

32. Soon after the initiation of the first international arbitral proceedings before the PAC, and the introduction of a new system of depositing arbitration costs from both parties to the dispute there were demands by the Croatian claimants that conditioned their share of the advance with the so called claimant's deposit on the part of the foreign claimant. Such deposit should, said the Croatian defendant, insure payment of costs incurred to the defendant, if claims should be dismissed.<sup>37</sup> Although the literature on arbitration is mainly unanimous about the claimant's deposit (**cautio iudicatum solvi**) not being in accordance with the nature of arbitral proceedings<sup>38</sup>, the issue came before the Presidium of the Permanent Arbitration Court, which decided that the claim for deposit on costs aimed at protection of domestic defendants in arbitral proceedings cannot be granted.<sup>39</sup>

## K. The Comparison of the Zagreb Schedule of Fees and Procedural Costs with Other Arbitral Institutions

33. Keeping in mind all the reservations stated in this paper about how difficult it is to foresee the exact amounts in every particular case, we shall give the schedule of fees of the PAC here (tariff no. 2):

"Tariff no. 2,

For arbitration, if carried out by an individual arbitrator, the arbitrator's fees shall be charged according to the following table:

The amount in dispute in DM		Arbitrator's fee basic fee (C) plus % excess (D) over (A) - in DM	
from (A)	to (B)	basic fee (C)	% (D)

<sup>37</sup> Defendants' claim was based on Art. 84 of the Conflicts of Laws Act (CLA), which reads as follows:

"The court shall determine the amount of the security for costs and the period within which it must be deposited, in the decision by which the request for the security for costs is allowed, and it shall point out to the plaintiff the consequences provided for by law if it shall not be shown that the security for costs has been deposited within the specified period."

<sup>38</sup> Comp. Triva-Belajec-Dika, *Gradjansko parni-no procesno pravo* (Civil Procedural Law), Zagreb, 1986, p.705; Dika-Kne`evi]-Stojanovi], *Komentar zakona o medjunarodnom privatnom i procesnom pravu* (Commentary on International Private and Procedural Law), com. with article 82 CLA, Belgrade, 1991, p. 268; Triva-Pozni}/Vorgi}/Varadi, *Arbitra`no re{avanje sporova* (Arbitral Settlement of Disputes), Belgrade, 1987, p.106.

<sup>39</sup> The decision, made at the meeting on November 17, 1992, had following grounds:

(The claim should be dismissed....)

- b) because arbitration is a form of voluntary jurisdiction, in which it is presumed that the parties give up some possible advantages of proceedings before the state judiciary, counting on some other advantages in arbitral proceedings;
- c) because depositing such an amount in arbitral proceedings is not congruent with the principle of equal treatment of the parties;
- d) because the request for the claimant's deposit is irrelevant regarding the provisions of par.3, article 5 of the Schedule of Arbitration Fees in international proceedings before PAC;
- e) because depositing it is not in accordance with the practice of other international arbitral institutions and organizations;

The demands for depositing security for costs is referred to in CLA; but, even if the claimant's deposit according to CLA could be required in arbitral proceedings, the Rules of International Arbitration of the Permanent Arbitration Court (the Zagreb Rules) do not foresee a subsidiary application of the Croatian procedural law (i.e. not even the CLA) Apart from this, in article 20 of the Zagreb Rules it is determined, that "the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality...." The depositing security for costs could, however, jeopardize the equality of treatment for domestic and foreign companies.

The above mentioned decision of the Presidium does not oblige the arbitration tribunals, so it is not impossible that they may take - depending on the circumstances) another position. In any case, we think that for such a decision other exceptional circumstances have to exist, and the consequences of default could not be the ones stated in article 84, CLA.

	10,000	500	
10,001	50,000	500	5
50,001	100,000	2,500	3
100,001	200,000	4,000	2,5
200,001	500,000	6,500	2
500,001	1,000,000	12,500	1
1,000,001	2,000,000	17,500	0,5
2,000,001	5,000,000	22,500	0,3
5,000,001	10,000,000	31,500	0,1
10,000,001	50,000,000	36,500	0,05
50,000,001	and more	56,500	0,01

**34.** When we compare this schedule of fees with the price-lists of the well established arbitral institutions (ICC, the Vienna Arbitral Center, Arbitration Court at the Chamber of Commerce of Zurich, etc.), we can see that the amounts charged for the arbitrators' fees are somewhat less, but not to the extent that eminent international and domestic arbitrators would find them unattractive. They are, for the amount in dispute of 5.000.000,00 DM (which are the most common ones), approximately 10 to 50 per cent less than the corresponding amounts in Paris, Vienna, Rome or London. On the other hand, when calculating the entire costs, we can see that the parties to the arbitral proceeding, by agreeing upon the jurisdiction of PAC, may accomplish significant savings, compared with some better known but also more expensive arbitral institutions.

**35.** A comparison with the schedule of fees of the neighboring arbitral institution, the Arbitration Court at the Chamber of Commerce of Slovenia, is very simple. The Zagreb and the Ljubljana schedules of fees are very similar and it seems that the later established Slovenian schedule of fees primarily took the Croatian one as a model. With respect to the minimal matter in dispute values, the Ljubljana schedule of fees is higher; within the range of approximately 50,000 to 1,000,000 DM the schedules of fees are almost the same (the one of Ljubljana is 10 % lower than the Zagreb one); in the case of higher amounts, the Zagreb schedule of fees is higher. It has to be mentioned, however, that the Ljubljana schedule of fees is universal for domestic and international disputes (in the case of domestic ones, the stated values ought to be reduced for 20 %), whereas the PAC, in the case of disputes without an international element, has a separate schedule of fees.<sup>40</sup>

**36.** For purposes of comparison with some arbitral tribunals of the former East European block, we can mention the very representative example of the International Arbitration Court at the Hungarian Chamber of Commerce, whose fees for arbitrators are 20 to 50 per cent lower than the Zagreb ones but the administrative costs are, on the other hand, many times higher than those of Zagreb.<sup>41</sup>

## L. Conclusion

**37.** We leave the readers of this paper to say whether the PAC has succeeded in creating an efficient and fair system regarding costs of arbitration proceedings. Its drafters intended to make it less expensive in comparison with some well established arbitral institutions, but at the same time attractive enough for the most qualified arbitrators, thus ensuring a quick, competent and cost-effective means of settlement of international commercial disputes.

<sup>40</sup> More about the costs before Slovenian Arbitration Court see in the paper by Kre{ }o Puhari}.

<sup>41</sup> Comp. Rules of Arbitration of the Arbitration Court at the Hungarian Chamber of Commerce, as in force since March 15,1993 and the enclosed table of costs.

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